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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1960

No. ~~609~~ 23

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Appellants,
VERSUS
HENRY E. DRUM, ET AL.,
Appellees.

No. ~~609~~ 24

REGULAR COMMON CARRIER CONFERENCE OF AMERICAN TRUCKING ASSOCIATIONS, INC.,
Appellant,
VERSUS
HENRY E. DRUM, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA.

MOTION TO DISMISS THE APPEAL, OR IN THE ALTERNATIVE, A MOTION TO AFFIRM

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Henry E. Drum, et al.

February, 1961.

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. CE 5-8780

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In the

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OCTOBER TERM, 1960

No. 608

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Henry E. Drum, N. C. Newman, A. D. Woodard, George F. Daves, Oscar Daves, Archie Norris, Eugene

Wiggins, Charles McGee, Tod Shinn, and Oklahoma Furniture Manufacturing Company, a corporation, file this motion under Rule 16 with their brief and in opposition to the request for review by the appellants.

MOTION

Appellees, Henry E. Drum, *et al.*, pursuant to Rule 16, move the Court to enter an order affirming the judgment of the United States District Court for the Western District of Oklahoma entered herein, or in the alternative, to dismiss the appeal for the reasons that it is manifest that the questions on which the decision of the cause depends are so insubstantial as to not need further argument, and the questions presented by appellants were not presented to or decided by the Interstate Commerce Commission or the District Court.

STATEMENT OF CASE

This is a direct appeal from a unanimous decision of a three-judge District Court vacating, setting aside and annulling a cease and desist order issued by the Interstate Commerce Commission (Commission). The opinion of the United States District Court for the Western District of Oklahoma is not yet officially reported. It appears as Appendix A to the Jurisdictional Statement of appellants in Case No. 608.

The District Court action was brought by appellees under 28 U.S.C.A. 1336, 1398 and 2321-2325, attacking the order of the Commission (Division 1) of April 22, 1959, in No. MC-C-2143, *Oklahoma Furniture Manufacturing Co.*,

et al., Investigation of Operations, 79 M.C.C. 403. The report of the Commission also appears in appellants' Jurisdictional Statement, Case No. 608, as Exhibit B.

The basic facts and circumstances of the operation in question have never been in dispute. Detailed statements of these facts as found by the District Court and Commission appear in Appendices A and B, respectively, appellants' Jurisdictional Statement. Briefly put, Oklahoma Furniture Manufacturing Company, a corporation (Oklahoma), is primarily engaged in manufacturing low-cost furniture which it transports in interstate commerce to its customers. Oklahoma utilizes seventeen trailers, seventeen tractors and two bobtails (for use at plant in Guthrie, Oklahoma, only) in the transportation operation. Oklahoma owns all of this equipment with the exception of eleven tractors which it leases from the individual appellees. The individual appellees are employed by Oklahoma under the terms of a contract with a union. These employees customarily drive their own tractors, but may be and sometimes are reassigned at the will of Oklahoma.

The Commission investigation was commenced under 49 U.S.C.A. 304(c)[1] to determine whether the drivers were

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[1] "(c) Upon complaint in writing to the Commission by any person, State board, organization, or body politic, or upon its own initiative without complaint, the Commission may investigate whether any motor carrier or broker has failed to comply with any provision of this chapter, or with any requirement established pursuant thereto. If the Commission, after notice and hearing, finds upon any such investigation that the motor carrier or broker has failed to comply with any such provision or requirement, the Commission shall issue an appropriate order to compel the carrier or broker to comply therewith. Whenever the Commission is of opinion that any complaint does not state reasonable grounds for investigation and action on its part, it may dismiss such complaint."

engaged in transportation for-hire, Oklahoma aiding and abetting in the violation of the Motor Carrier Act. The Commission found that part of Oklahoma's operation conducted by Oklahoma trailers, leased trucks and "owner-operators" to be transportation for-hire (contract carriage). Oklahoma's operation by owned tractors, trailers and driven by persons not owner-operators was held to be private carriage. The District Court held the entire operation to be private carriage.

It would be difficult for an attorney to urge the unimportance of a case involving the livelihood of his clients, in issue more than three years, and now before this High Court. We make no attempt to do so.

We do urge that the Commission erred in its decision, the District Court corrected this error under correct law, and appellants' contentions lack merit to the extent that the question presented to this Court is insubstantial.

THE INTERSTATE COMMERCE COMMISSION COMMITTED ERRORS OF LAW. THE ORDER WAS NOT BASED ON SUBSTANTIAL EVIDENCE.

Appellants, United States and the Commission, represent the scope of this appeal as follows:

> "This appeal goes only to the question whether, as the district court thought, the control exercised by Oklahoma over the operations is determinative or whether, as the Commission alternatively held, the transportation should be characterized as contract carriage whether or not subject to Oklahoma's control" (Jurisdictional Statement, page 7).

The term "control" is not defined in the Jurisdictional Statement but is described as something "that may readily be shifted to suit the parties' convenience" (id 7) and a "single element" (id 13). "Control" as used in the Commission report and as used in the District Court opinion are different species, neither of which possesses these simple attributes.

The "control test" is a concept created by the Commission.[2] It has been used in many Commission decisions.[3] It has also been approved or used by the courts.[4] A clear statement of this test appears in the decision of *H. B. Church Truck Service Co., Common Carrier Application*, 27 M.C.C. 191, at 195 and 196:

> "With reference to the leased-truck operations, the first question presented is whether the operation is that of applicant, as the performance of transportation for hire, or whether it is private carriage, performed by the shipper. The line of distinction between the two is not always clear. Essentially the issue is as to who has the right to control, direct, and dominate the performance of the service. If that right remains

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[2] *United States* v. *Thompson*, 321 U.S. 19, 88 L. Ed. 513, 64 Sup. Ct. 392.

[3] *Watson Mfg. Co., Inc., Common Carrier Application*, 51 M.C.C. 223 (1949); *John J. Casale, Inc., Contract Carrier Application*, 44 M.C.C. 45 (1944); *Shields Extension of Operations-Alliance, Ohio*, 41 M.C.C. 100 (1942); *H. B. Church Truck Service Co., Common Carrier Application;* 27 M.C.C. 191 (1940); *C. E. Hall & Sons, Inc., Contract Carrier Application*, 24 M.C.C. 33 (1940); *N. E. Rosenblum Truck Lines, Inc., Contract Carrier Application*, 24 M.C.C. 121 (1940); *Dixie Ohio Exp. Co., Common Carrier Application*, 17 M.C.C. 735 (1939).

[4] *Interstate Commerce Commission* v. *Gamnoe*, 100 F. Supp. 790 (1951); *Interstate Commerce Commission* v. *Cheesbrough*, 77 F. Supp. 441 (1948); *Motor Haulage Co.* v. *United States*, 70 F. Supp. 17 (1947), *aff'd*, 331 U.S. 784, 67 Sup. Ct. 1205.

in the carrier, the carriage is carriage for hire and subject to regulation. If it rests in the shipper, it is private carriage and not subject to regulation except to the limited extent provided in section 204(a)(3). The question as to who has the right to control and direct must be answered in the light of all the facts and circumstances surrounding the transaction between the carrier and shipper, and of the actual practices in the conduct of the operation thereunder. No one element of such facts and circumstances is by itself conclusive."

We point out that this test uses the word "control" to indicate the identity of the one furnishing a transportation service. Control is that conclusion drawn from the facts and circumstances surrounding the transaction and the actual practices, no one of which is by itself controlling. This type of control is neither a single element nor readily shifted.

In the case at bar the Commission did not apply the control test as set out in the *H. B. Church* case, *supra*. The determination of status was said to rest upon the answers to two questions, both of which must be answered in the negative before there could be private carriage not subject to regulation. Those questions are:

"* * * Determination of whether particular arrangements such as those involved here result in private operations by the lessee or for-hire operations of the lessor is dependent upon the answer to two questions; namely, (1) is the transportation here involved such that any person or persons other than the purported private carrier have any right to control, direct, and dominate it, and (2) are any persons here, in substance, engaged in the business of interstate or foreign transportation of property on the public highways for hire * * *" (Jurisdictional Statement, page 45).

In discussing question number one, the Commission distinguished between "exclusive right to control" and "actual control," (Jurisdictional Statement, page 45). The Commission plainly stated that it was concerned only with the exclusive right to control in answering the first question.[5] At this point the Commission invoked the presumption of transportation for hire set out in the *H. B. Church* case, *supra*:

> "* * * In *H. B. Church Truck Service Co. Com. Car. Application* 27 M.C.C. 191, hereinafter called the *Church* case, it was stated:
>
> > 'in cases in which the question of the status created by a lease of equipment with drivers by a carrier to a shipper is presented, in the absence of a showing to the contrary, the presumption arises that the transportation is performed by the carrier for compensation, in other words is for-hire transportation and as such is subject to regulation. This presumption will, of course, yield to a showing that the shipper has *the exclusive right and privilege of * * * controlling the transportation service*, as, for example, if the equipment were operated by the shipper's employee. (Italics added)' * * *" (Jurisdictional Statement, page 46).

The Commission then enumerated six elements of control actually exercised by Oklahoma to the exclusion of the

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[5] Each of the leases provides that Oklahoma "shall have sole control, right of direction, and use of the leased equipment" (*Jurisdictional Statement*, page 21). Oklahoma also has the right to fire the drivers independently of the leased equipment (*Jurisdictional Statement*, page 24).

drivers. These proven and acknowledged elements of control were disregarded:

> "* * * All of these practices may tend or are designed to show that the owner-operators actually exercise little, if any, control, direction, and dominance over the considered operations, but they have little probative weight with respect to the question of whether the company has the *exclusive right* to control, direct, dominate the transportation purportedly performed by it as private carriage * * *" (Jurisdictional Statement, page 47).

In the paragraph that follows the above quotation, the Commission held the presumption was not rebutted nor could it be.

> "* * * There is present, whenever the owner-operator drives his own equipment, the right and power of the lessor to defeat any supposed right to control that the shipper-lessee may believe exists * * *" (Jurisdictional Statement, page 48).

This reasoning by the Commission was condemned by the District Court as repudiating the *H. B. Church* case and making the presumption irrebuttable (Jurisdictional Statement, page 29). In requiring the respondents to prove that Oklahoma had every known and imagined right to control, the Commission cast an impossible burden upon respondents. We also point out that the Commission did not name or identify what right to control was left outstanding nor did it define what is entailed in "exclusive right to control."

The District Court provided an alternative distinct from misuse of the presumption by the Commission. The alternative was that the presumption of the *H. B. Church* case, *supra*, was not applicable; the Commission had formulated a new presumption. In stating this alternative the Court was lenient with the Commission. The Commission report says:

> "* * * The presumption, as noted above, refers to the lessor of equipment as the 'carrier,' but it is clear that the presumption does not depend upon a prior determination that the 'lessor' is a 'carrier.' Rather, it rests upon the lessor-lessee relationship between those involved and arises whenever any person or persons other than the purported private carrier leases equipment with drivers to a shipper * * *" (Jurisdictional Statement, page 46).

The above quotation should be compared with the following quotation from the decision *John J. Casale, Inc., Contract Carrier Application*, MC-20,314, 44 M.C.C. 45, which was not called to the attention of the District Court (Referring to the *H. B. Church Co.* decision):

> "It was also pointed out that the 'lease' by a motor carrier of equipment with drivers to a shipper raises a presumption that the resulting operation is that of the carrier; however, such presumption will yield to a showing that the shipper has the exclusive right and privilege of directing and controlling the transportation service.
>
> "We are not unmindful of the fact that such presumption arises only in those instances where a *motor carrier* furnishes equipment with drivers to a shipper under an arrangement such as described. In other

words the one furnishing the equipment must have acquired the status of a motor carrier at the time the so-called leases were negotiated. Applicant admittedly was a motor carrier as to part of its operations on the critical date and for several years thereafter . . ."

THE DISTRICT COURT PROPERLY CORRECTED THE COMMISSION ERRORS

The Commission expressly held through the use of a presumption that Oklahoma did not have the "exclusive right to control." Appellants argued orally and in brief to the District Court that Oklahoma did not have "control." The District Court discussed the Commission's ruling and appellants' contentions concerning control. Appellants have now disassociated themselves from control which they argue to be immaterial. Appellants further argue that the District Court considered nothing but control; and hence, committed error.

Appellants' contentions misconstrue the opinion. The District Court clearly sets out the issue to be determined:

> "The primary issue presented is whether the interstate transportation operations herein involved constitute private carriage conducted by the Company, or contract carriage on the part of the owner-operators. As the court in *Lamb* v. *Interstate Commerce Commission*, 10 Cir., 259 F.2d 358, put it, 'Simply stated it is who was transporting the goods in question,' that is, whose operations in interstate transportation were these, those of the Company or those of the owner-operators?" (Jurisdictional Statement, page 24).

The decision on this issue is likewise clearly stated:

> "As is urged by defendants, substance, not form, should be the governing factor in determining whether these operations constituted transportation for-hire on the part of the owner-operators. *United States* v. *La Tuff Transfer Service, supra; Georgia Truck System, Inc.* v. *Interstate Commerce Commission, supra.* In the instant case both the form and the substance of the arrangements as revealed by the lease agreements, union contract and actual operations, clearly point to the fact that what is involved here is private carriage on the part of the Company, rather than transportation for-hire by the owner-operators. The Company dominates and controls the transportation in question just as it did prior to the inauguration of the leasing arrangements. The change in form alone did not change the substance of the Company's operations. The same degree of control is exercised by the Company over the operations of the owner-operators as is exercised over those of drivers of company-owned vehicles" (Jurisdictional Statement, pages 30, 31).

The issue for determination under the District Court opinion is the identity of the person furnishing a transportation service. The issue under the Commission's "control" test as set out in the *H. B. Church* decision is the same. Both approaches look at all the facts and circumstances of the transaction to determine the substance of the arrangement.

The two questions asked by the Commission in this case will also operate to fix the identity of the one providing the transportation service. However, the questions must be answered in a straight forward manner, without

presumptions, without casting an impossible burden of proof on the respondent to the investigation, and by a fair evaluation of the evidence.

The District Court opinion does not condemn the Commission's tests; it insists that these tests be correctly applied.

THE APPELLANTS PROPOSE AN INSUBSTANTIAL QUESTION

Because all of the facts and circumstances of the transaction were weighed by District Court, it necessarily follows that the "financial risks and burdens" test proposed by appellants is a part of the whole. This concept was not mentioned or argued to the District Court. It was not expressed by the Commission in its decision. It is significant that no Federal Court opinion has ever used it as the question to be answered. It is a reversal of the former Commission decision in *Watson Manufacturing Co., Inc., Common Carrier Application*, 51 M.C.C. 223.

Appellants cite three cases which they contend support this proposition[6] (Jurisdictional Statement, page 15). Each of these cases uses the same test:

> "(1) In the court and Commission cases the issue of whether a carrier status subject to regulation on the part of the lessor existed has been determined by how much service which goes with ordinary hauling for

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[6] *United States* v. *La Tuff Transfer Service*, 95 F. Supp. 375 (D. Minn.); *Interstate Commerce Commission* v. *Isner*, 92 F. Supp. 582 (E.D. Mich.); *Interstate Commerce Commission* v. *F. & F. Truck Leasing Co.*, 78 F. Supp. 13 (D. Minn.).

compensation was being furnished the shipper in addition to the leased vehicle. Also whether on the whole the dealings and arrangements between the parties indicate that a transportation service was being rendered by the lessor to the lessee rather than simply furnishing for private operation a vehicle to a shipper, and whether the vehicle was being operated by the shipper in the same manner as would normally obtain if he were the owner of the rented equipment." *Interstate Commerce Commission* v. *F. & F. Truck Leasing Co.*, 78 F. Supp. 13, at page 19.

The quoted test determines the identity of the one providing a transportation service by determining how much service the lessor provides and whether on the whole it amounts to a transportation service.

The three cases cited by appellants each involve subterfuge. No subterfuge is involved in this case and appellants have never so contended. The facts of the cited cases vitally differ from the facts of the case at bar. In the *F. & F. Truck Leasing Co.* case, *supra*, the Court pointed out at 78 F. Supp. 19, paragraph (2), seven essential facts which established that the lessor was a motor carrier. In the following paragraph, the Court pointed out three additional facts establishing the motor carrier status of the lessor. Not one of those ten enumerated facts is present in the case at bar. Examination of those ten important points in relation to the present facts can produce only one conclusion: That Oklahoma is providing a transportation service to itself.

Appellants assert that the individual appellees are in the business of providing a transportation service for compensation. The case of *Local 24 of I. B. of T., C., W. & H. of*

America v. *Oliver, et al.*, 358 U.S. 283, 3 L. Ed. 312, 79 Sup. Ct. 279, held that persons such as appellees are employees. The terms of their employment and lease of equipment were subject to union contract. Appellants would have Oklahoma in the anomalous position of negotiating with the employees' union for the price of *contract carriage.*

The Commission is attempting to prohibit in private carriage what it allows with regulation in common and contract carriage. See *American Trucking Association* v. *United States*, 344 U.S. 298, 97 L. Ed. 337, 73 Sup. Ct. 307. In the case at bar, the "owner-operators" are more thoroughly integrated in Oklahoma than required by Commission rules governing motor carriers.

A financial risk and burdens test asked for by appellants would produce doubt on settled law. It has been established that rental of equipment, the lessor providing maintenance, oil, and gas does not constitute transportation for hire. *Motor Haulage Co., Inc.* v. *United States, et al.*, 70 F. Supp. 17, *affirmed*, 331 U.S. 784, 91 L. Ed. 1815, 67 Sup. Ct. 1205; *U-Drive It Company* v. *Pennsylvania Inc., Common Carrier Application*, 23 M.C.C. 799.

The substance of appellant's proposed test has been rejected in determining whether an "owner-operator" is providing transportation for hire. *Earle* v. *Babler*, 180 F.2d 1016.

Before the Commission's hearing officer, counsel for the Commission gave appellees to understand that the need for this particular type of operation was immaterial to the question of its legality. The needs of common and contract

carriers are likewise immaterial to the legality of this operation.

Appellants cite and quote from *Gray Area of Transportation Operations*, a study of the Bureau of Transport Economics and Statistics of the Interstate Commerce Commission, June 1960. District Court trial of this case was on June 15, 1960. That study was not presented to the court as either evidence or authority. The preface states that the study was prepared for the Chairman of the Senate Committee on Interstate and Foreign Commerce. It is a self-serving declaration. It admits the conjectural and incomplete nature of its data throughout the study.

Another serious objection to this study is that at page 93 this case is cited as a gray area and illegal operation. This case is discussed but not named in the last paragraph of page 9, continuing to page 10. Moreover, on the cover page of *Gray Area of Transportation Operations* it states: "This study, issued as information, has not been adopted by the Interstate Commerce Commission." We object to having the evils of the entire industry placed on our shoulders.

Congress has expressed the National Transportation Policy, *Historical Note, preceding*, 49 U.S.C.A. 301.

The National Transportation Policy states in part:

> "It is hereby declared to be the National Transportation Policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; * * *."

Appellants argue that private carriage must forever keep all of its inherent disadvantages while the Commission freely allows common and contract carriers to divest themselves of the inherent disadvantages of their respective modes of transportation. In the case at bar, Oklahoma has divested itself of the disadvantage of capital investment in the ownership of eleven tractors. These eleven tractors constitute only a part of the capital of this operation. The balance of the capital required in the operation is furnished by Oklahoma. In addition to the heavy capital investment of Oklahoma in this operation, Oklahoma has retained the risk of loss for safe delivery of cargo, direction and supervision of the drivers, the loader, the routes, and responsibility to the public for negligence. The Commission in this decision at pages 48 and 49 of the Jurisdictional Statement cites the decision *Fleming Common Carrier Application*, 8 M.C.C. 469, as authority for the proposition that common and contract carriers need not own *any* of the equipment used in the operation. At pages 50 and 51 of the Jurisdictional Statement, the Commission sees no harm in allowing motor carriers to divest themselves of responsibility for safe delivery of cargo, direction and supervision of the drivers, and responsibility to the public for negligence. The Commission's position in the instant case is, therefore, opposed to the National Transportation Policy and does not provide "fair and impartial regulation of all modes of transportation subject to the provisions of this Act. So administered as to recognize and preserve the inherent advantages of each; * * *."

This operation is well summarized and defined in the dissenting opinion of Commissioner Webb:

> "• • • Interspersed throughout the report are references to 15 indicia of private carriage not one of which is present in the typical contract carriage operation. The Oklahoma Furniture Manufacturing Co. (1) pays the owner-operators for driving; (2) deducts from their paychecks social security and Federal income taxes; (3) provides workmen's compensation benefits; (4) retains the right to hire and discharge drivers independently of the lease arrangement; (5) bargains with a labor union respecting the wages of owner-operators and other conditions of employment; (6) provides the trailer; (7) has exclusive control over the use of all transportation equipment; (8) assumes full responsibility for maintaining such equipment in first-class operating condition; (9) takes full responsibility for damage to cargo; (10) loads and dispatches the shipments; (11) issues detailed routing instructions; (12) issues no bill of lading; (13) keeps drivers' logs and medical certificates; (14) pays for public liability and property damage insurance, and (15) expressly reserves to itself the exclusive right to control and direct the transportation service involved. It is highly unlikely that there is any carrier in the United States whose connection with the prime attributes of transportation service is as tenuous as that of the respondents" (Jurisdictional Statement, pages 56 and 57).

The appellant, Regular Common Carrier Conference of American Trucking Association, Inc., in Case No. 609, relies upon the case of *B & C Truck Leasing, Inc., et al.* v. *Interstate Commerce Commission*, 283 F.2d 163. The distinction between that case and the one at bar is so obvious that it is easily overlooked. In that case where is the private

carrier? There is none. No party to the case asserted that it was a private carrier. The persons who received the services of B & C Truck Leasing, Inc., and Ogden Drivers Service, Inc., were so devoid of any of the characteristics of private carriage that neither the majority opinion nor the minority opinion, diametrically opposed, raised the possibility.

Evidently, appellants desire that we defend the minority position of that case. Because private carriage was not an issue in that case, neither opinion is here material. The case at bar is not one of avoidance or evasion. Private carriers are included in the Motor Carrier Act and are regulated by the Commission as to safety of operation. We seek to be properly included, not completely disconnected. The issue in that case was whether two corporations could in concert furnish a transportation service and be neither common, contract nor *private carrier*.

The shippers in that case did nothing but ship. Every function performed by Oklahoma represents a distinction to the *B & C Truck Leasing, Inc.*, case. When fifteen or more impressive functions, which are indicia of private carriage, are recognized as being performed by Oklahoma, it is manifest that the distinction between the two cases is one of substance.

The *B & C Truck Leasing, Inc.*, case, *supra*, and the case at bar are not contradictory because each deals with a different question, under different facts. Both cases can stand in the Tenth Circuit.

SUMMARY

The Commission in its decision set up two questions for determining whether Oklahoma was a private carrier or the drivers of Oklahoma tractors were in the for-hire transportation business. The first question required that no person other than Oklahoma control the operation. Control in other persons was presumed and the burden of supplying evidence was cast upon the respondents to the investigation who are the appellees here. The respondents produced substantial evidence of control exercised by Oklahoma. The Commission, however, held that this evidence of actual control was immaterial. According to the Commission, the presumption required Oklahoma to prove its "exclusive right to control."

The District Court properly held that the Commission had both repudiated the decision from which it took the presumption and had made the presumption irrebuttable. After disapproving of the Commission's use of the presumption, the District Court found that the substance of the arrangement revealed that Oklahoma was providing a transportation service to itself as a private carrier. The determination of private carriage is not a novel question of law and the District Court followed established precedent.

The appellants now assert that the District Court exclusively used a control test. The written opinion of the District Court is its own evidence to the contrary. Appellants propose a test which was not proposed to the District Court. This test is merely an attempt to stress certain facts less than the entire operation, which facts appellants

feel are more favorable to them. The District Court considered all of the facts, which are detailed in that Court's opinion.

As between three types of carriage by motor vehicle which Congress created, no type is entitled to a more liberal definition than the other. Questions of siphoning off traffic from common and contract carriers is secondary. Before the siphoning off, if any, is condemned, it must first be established that Oklahoma is not a private carrier.

The question presented by appellants is insubstantial and the appeal should be dismissed or affirmed.

Respectfully submitted,

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February, 1961.

CERTIFICATE OF SERVICE

I, Walter D. Hanson, attorney for the appellees, Henry E. Drum, *et al.*, and a member of the bar of the Supreme Court of the United States, hereby state that on the 14th day of February, 1961, I served copies of the foregoing Motion to Dismiss the Appeal, or in the Alternative, a Motion to Affirm, on the several parties as follows:

1. On the United States, by mailing copies, air mail, duly addressed and postage prepaid, to Honorable Archibald Cox, The Solicitor General, Department of Justice, Washington 25, D. C., Robert A. Bicks, Assistant Attorney General, Department of Justice, Washington 25, D. C., John J. Voortman and Richard A. Solomon, Attorneys, Department of Justice, Washington 25, D. C., and Paul W. Cress, United States Attorney, Oklahoma City, Oklahoma.

2. On the Interstate Commerce Commission, by mailing copies, air mail, duly addressed and postage prepaid, to Robert W. Ginnane, General Counsel, Interstate Commerce Commission, Washington 25, D. C., and B. Franklin Taylor, Jr., Assistant General Counsel, Interstate Commerce Commission, Washington 25, D. C.

3. On Regular Common Carrier Conference of American Trucking Associations, Inc., appellant, by mailing copies, air mail, duly addressed and postage prepaid, to John S. Fessenden and Roland Rice, 618 Perpetual Building, 1111 E. Street, N. W., Washington 4, D. C.

4. On appellee, Weather-Seal, Inc., by mailing a copy, air mail, duly addressed and postage prepaid, to Charles R. Iden, Esquire, Attorney, 2200 First National Tower, Akron 8, Ohio.

WALTER D. HANSON,

Attorney for Henry E. Drum, *et al.*, Appellees.

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 608

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

HENRY E. DRUM, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

MEMORANDUM FOR APPELLANTS IN OPPOSITION TO MOTIONS TO AFFIRM

The question presented by this appeal is whether one who owns a truck tractor, drives it to pull the trailers of another and bears substantially all the risks of a profitable return on the time and capital invested, is a for-hire carrier as that term is used in the Interstate Commerce Act. It is appellants' contention that such carrier status exists even though the owner-operator may have surrendered to a shipper

every significant element of physical control. The importance of assigning to financial risk its proper weight as a critical indicium of "carriage" is discussed in the jurisdictional statement and need not be repeated here. However, appellees' motions to affirm assert that the government is now taking a position which was not adopted by the Commission in its report and order (J.S. 34-60) or placed before the district court (Weatherseal motion to affirm, p. 2, Drum motion to affirm, p. 12). This reply demonstrates the invalidity of that contention.

The Commission reached its determination that the owner-operators were carriers under two separate tests, whether they possessed the right to exercise any substantial control over the vehicles and whether, regardless of control, they engaged in substance in transportation for hire. Its holding under the second of these tests clearly embraces the issue presented in the jurisdictional statement. Thus, the Commission found that each owner-operator was a contract carrier because "He provides a service in which the equipment is furnished, maintained, and driven by the owners thereof to transport property in interstate commerce. He guarantees a fixed and definite cost for the transportation, bears the risk of profit or loss from such transportation hazards as delays in transit, breakdowns of equipment, and highway detours, and meets all of the cost of operation including appropriate licenses and trip expenses." (J.S. 49-50.)

Appellants' contention was likewise clearly before the district court. At pages 6 and 7 of the Government brief of May 1960 under the heading "Plaintiff

Owner-Operators Provide a Complete For-Hire Transportation Service" the following language appears:

> The two most essential elements of a transportation service are the actual physical moving of the freight and bearing the risk of loss or chance of gain on the investment of the time and equipment utilized in the transportation.
>
> It seems clear that the owner-operators here bear the risk of loss and have the chance of gain. They invest their time and money in buying, licensing, fueling, driving, and possibly insuring their tractors. This investment is subject to the uninsurable risks of the costly replacement and repair of parts, fluctuation in the price of gas, oil, licenses, and other operating expenses and the risk that the vehicle will not be utilized a substantial part of the time. The latter risk is particularly great under this purported lease, since the owner-operators promise to carry only Oklahoma Furniture's freight but Oklahoma Furniture does not promise to provide any freight. * * * It is the owner-operator who must keep the cost of these items below the price per mile which Oklahoma Furniture pays and who, if he does so, reaps the profit. The owner-operator renders, in effect, a transportation service at a fixed price per mile and thus assumes the responsibility for any ultimate profit or loss incurred in the transportation operation. * * *

A substantially similar argument was made in the brief of June 1, 1960 of Intervenor, Regular Common Carrier Conference of American Trucking Associa-

tion, Inc., the relevant portions of which are set out in the Appendix to this brief, pp. 5-7, *infra*.

It is clear, therefore, that the issue presented in this appeal was presented below. In view of its importance in the regulation of transportation, probable jurisdiction should be noted.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

ROBERT W. GINNANE,
General Counsel,
Interstate Commerce Commission.

MARCH 1961

APPENDIX

Brief of the Regular Common Carrier Conference of the American Trucking Association, Inc., filed in the district court on June 1, 1960, pp. 16-18 (footnotes omitted):

b. *Substance of arrangement is transportation for-hire.* The purported lease agreement provides that the owner of tractor equipment be compensated at a rate of 10 cents a mile for hauling a single axle trailer or 11 cents a mile for hauling a tandem axle trailer. The contract provides an additional 3 cents a mile for inbound hauls of raw materials because they are heavier loading than the Company's furniture products.

Under the contract the Owner-operator must pay all operating costs such as gas, oil, grease, parts, and license plates. The contract provides that the Company shall maintain equipment but this provision is inconsistent with the union contract which provides that Owner-operators shall pay for maintenance and repair of their own equipment. The record shows the actual fact is that the Owner-operators pay for maintenance, repair and upkeep of their equipment. The contract further provides that Company will not be responsible for damage to the equipment from any cause and if the Owner-operator carries collision, fire, theft or any other type of insurance it must be at his own expense. The Company does provide public liability and property damage insurance.

The purported "lease" states that Company shall have exclusive control, right of direction, and use of the equipment. Inasmuch as the Owner-operators garage the equipment, do not work every day, generally drive their own vehicles when they are used for the transportation of Company products, and use their vehicles for transportation between their homes